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IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

No. 268

MRS. DAGMAR C. JOSEPH,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12
PROOF OF SERVICE	18
APPENDIX A Opinion and judgment below	19
APPENDIX B Order denying rehearing	21

CITATIONS

GILBERT V. LACHAPELLO, 127 F. 2d 750	16
MERRIT CHAPMAN AND SCOTT CORP. V. KENT, 309 F. 2d 891, certiorari dismissed 83 S. Ct. 1118, 372 U.S. 982, LO L. Ed. 2d 197	16
ROYSTER V. LEDERLE, 128 F. 2d 197	16

STATUTES

TITLE 8 U.S.C.A. Sec. 2314	3
RULE 7(f) FEDERAL RULES OF CRIMINAL PROCEDURE	3

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Mrs. Dagmar C. Joseph, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the cause entitled: "Mrs. Dagmar C. Joseph vs. United States of America" No. 21,449 of the docket of said Court, which judgment was entered on April 6, 1965 (R. 258) and as to which a rehearing was denied on May 21, 1965. (R. 264)

CITATION TO OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is reported in 343 F. 2d 755, Advance Sheets, May 24, 1965, No. 3. Said opinion also appears in the printed copy of the record filed herewith (R. 256) and in the appendix of this application.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1965 (R. 258) and timely application for rehearing was filed on April 22, 1965. (R. 259) Rehearing was denied on May 21, 1965 (R. 264) without opinion. Stay of mandate was granted through June 21, 1965.

The jurisdiction of this Court is invoked under Title 28 USC Sec. 1254.

QUESTIONS PRESENTED

1. In a prosecution for violation of Title 18 U.S.C.A. Section 2314, for transporting in interstate commerce an altered check, where the primary issue is the validity of expert evidence as to handwriting offered by the Government, is it an abuse of discretion by the trial Court to deny counsel for the defendant a continuance where said counsel has had only six days to prepare for trial and has had no opportunity to obtain rebuttal expert opinion whatever?

2. In a prosecution for violation of Title 18 U.S.C.A. Section 2314, for transporting an altered check in interstate commerce, where the theory of the government's case as to transportation of the altered check is that the defendant caused said altered check to be deposited

into a bank account existing under fictitious names, and where the defendant files a motion for a bill of particulars as to her alleged connection with said method of setting in motion the transportation of said check, is said defendant entitled to more particulars than the bare allegation *"that it was deposited by the defendant in a New Orleans bank for collection through ordinary channels."*

STATUTES INVOLVED

Title 18 U.S.C.A. Section 2314.

Rule 7(f) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

The indictment under which petitioner was tried and convicted was filed Jan. 8, 1964, in which it was charged:

> That on or about August 15, 1961, at New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana, one DAGMAR C. JOSEPH did knowingly, willfully and feloniously, and with intent to defraud, transport and cause to be transported in interstate commerce, to-wit, from New Orleans, Louisiana, to Buffalo, New York, an altered security, to-wit, check no. 317090 in the amount of $3,911.55, dated August 3, 1961, payable to Gelsmar & Company, Inc., signed "L. E. Salada" and "T. E. Elroy Bartlett," and drawn on the Manufactures and Traders Trust Company, Buffalo, New York, then and there well know-

ing the security was falsely altered in that the true name of the payee was "Geismar & Company, Inc.", all in violation of Title 18 United States Code, Section 2314.

The foregoing indictment replaced or superseded an older indictment which had been found defective. (R. 5) and defendant was arraigned on Jan. 15, 1964. (R. 5). Prior to her arraignment she filed a motion for a bill of particulars and pleaded not guilty, all of this taking place on the same date, Jan. 15, 1964. (R. 5, 6, 7)

AT THE SAID ARRAIGNMENT ON JAN. 15 IT WAS CALLED TO THE COURT'S ATTENTION THAT THE CASE WAS ALREADY SET FOR TRIAL SIX DAYS HENCE, ON JAN. 21, 1965. This sudden fixing of the case for trial obviously took the Court by surprise, as well as newly employed counsel for the defense. The device whereby this sudden fixing for trial was secured was that the government simply "latched on" to the earlier trial date set for the trial under the old and dismissed indictment. (R. 5) That this was a surprise to the Court, as well as to newly employed defense counsel, is evident from the following exchange which occurred at the arraignment on Jan. 15, 1964. (R. 7):

> MR. DOWLING: On the arraignment itself, we waive the reading, and enter a plea of not guilty, and reserve our rights to file technical pleadings.
>
> THE COURT: All right. *You have ten days to file pleadings.*

MR. DOWLING: Yes, Your Honor.

MR. LUCAS: *Your Honor, this matter is set for trial.*

THE COURT: Just a minute.

MR. DOWLING: I am sorry.

THE COURT: Set for trial when?

MR. LUCAS: The 21st. THAT IS THIS COMING TUESDAY.

(Emphasis added)

Thereupon, counsel for defendant, Mr. Dowling, urged the necessity of some sort of delay in order to obtain expert testimony as to the handwriting samples which were obviously to play an all important role in the case. Counsel for the defendant stated: (R. 8)

MR. DOWLING: Now, if Your Honor please, with regard to that, I just got into this case, as Your Honor knows, and I want to get Mr. Banard, and expert, to examine these writings and so forth.

THE COURT: Let the defendant be seated.

MR. DOWLING: So I was going to ask Your Honor if it was possible to get a postponement of this case from Tuesday. That doesn't give me very much time to properly prepare this case.

THE COURT: You want to get whom?

MR. DOWLING: I would like to get Mr. Bernard who is an examiner of documents, who was connected with the Government as handwriting expert. I understand this case revolves, primarily, around a great deal of handwriting. Consequently, I understand further that the handwriting made by this lady at the time of unsuspicious banking account that she had, none of that has ever been examined. In order to properly defend this case, I believe that I have the right to have a handwriting expert of my own chosing.

THE COURT: Where does he live?

MR. DOWLING: He lives in Baton Rouge.

At this juncture, the Government urged that previous counsel, who had earlier represented defendant under the old and superseded indictment, had ample opportunity to examine the handwriting samples involved. (R. 8, 9) Whereupon, the Court, after same hesitation, finally overruled the objection for a continuance, thus obliging the defense to go to trial on the *sixth day after the arraignment and the seventh day after the filing of the new indictment.* (R. 10)

At the time of arraignment, defendant also argued the motion for bill of particulars, which demanded to know by what means the defendant was alleged to have caused the altered check to be transported in interstate commerce. (R. 11)

To this motion the Government was permitted to respond by simply alleging that the check "was deposited by the defendant in a New Orleans bank for collection through ordinary banking channels." (R. 6 and 15)

The defendant objected to the sufficiency of the information furnished, whereupon the Court demanded: (R. 6)

> THE COURT: What is it you want? You want to know what train it went by?
>
> MR. DOWLING: No, sir, I do not.
>
> THE COURT: It went through ordinary banking channels. It would be easy enough to have the bank send us their checks.
>
> MR. DOWLING: Well, Your Honor, I don't know whether you read the motion or not.
>
> THE COURT: Yes, I read it.

Though the Court doubtless read the motion he also doubtless failed to perceive the necessity of requiring the government to give more information as to WHOSE BANK ACCOUNT THE CHECK WAS ALLEGEDLY DEPOSITED BY DEFENDANT BECAUSE THE BULK OF THE GOVERNMENT'S PROOF CONSISTED OF EXPERT HANDWRITING TESTIMONY AIMED AT SHOWING THE SIMILARITY BETWEEN THE HANDWRITING OF THE DEFENDANT AND THAT OF THE FICTITIOUS PERSONS IN WHOSE NAMES

THE PROCEEDS OF THE ALTERED CHECK WERE ULTIMATELY DEPOSITED.

Thus, in addition to the severe handicap of having only six days in which to prepare a defense in a case revolving entirely around the validity of expert testimony as to comparison of samples of handwriting, petitioner was saddled with the further insuperable burden of "flying blind" as to which handwriting samples were to be compared with those of petitioner. For, when the Court refused, as it did, to force the Government to name the persons or "agents" used by petitioner in the alleged scheme (Motion for Bill of Particulars, paragraphs (e) and (f) (R. 13)) it thereby shut off all definite information as to the modus operandi of the alleged fraudulent scheme. Thus, without definite notice of any kind, petitioner was called upon to *disprove the alleged similarity between her supposed handwriting samples and those purporting to be the handwriting of third parties unknown to petitioner.*

, MOREOVER, IN ADDITION TO ALL OTHER HARDSHIPS OBVIOUS ON THE FACE OF THE RECORD, THERE WAS AN IMPORTANT FACTOR UNKNOWN TO THE COURT OR COUNSEL FOR DEFENDANT AT THE TIME THE CONTINUANCE WAS REFUSED, NAMELY, THAT SOME OF THE HANDWRITING SAMPLES, AS TO WHICH THE GOVERNMENT EXPERT TESTIFIED, HAD ONLY BEEN COLLECTED AND EXAMINED ON THE SATURDAY BEFORE TRIAL. (R. 158)

It is obvious from the remarks and attitude of the Court that the Court was of the impression that previ-

ous counsel in the old case under the superseded indictment had ample opportunity to obtain expert opinions as to the handwriting samples to be used. (R. 9) BUT IT WAS NOT UNTIL MID-TRIAL THAT IT DEVELOPED THAT SOME IMPORTANT SAMPLES, AIMED AT EXCULPATING A MR. STROBEL, WHO HAD ACCESS TO THE CHECK IN QUESTION, HAD BEEN OBTAINED BY THE F.B.I. AND EXAMINED BY THE EXPERT ONLY A FEW DAYS BEFORE TRIAL. (R. 158)

WHOLE CASE BASED UPON COMPARISON OF HANDWRITING

The entire structure of the Government's case was based upon a comparison of handwriting. The outline of the Government's theory is succinctly set forth in its opening statement (R. 22 et sequo) and may be condensed in bold outline as follows:

The National Gypsum Company issued from its Buffalo, New York office a check for $3911.55 payable to "Geismar and Co., Inc." dated August 3, 1961. The check was sent to the New Orleans office of Geismar and Co., Inc. in payment for goods sold by the latter company to National Gypsum. In New Orleans a "dummy" bank account was set up under the name of "GELSMAR AND COMPANY, INC." Then, according to the government theory, the check was altered so as to substitute an "L" for the "I" in Geismar, thus making the check appear to be payable to "Gelsmar and Company, Inc.". The altered check was then deposited into the dummy Gelsmar account, (which was set up as a partnership account) and in a matter of days, the total sum was siphoned off by checks which

were deposited into other accounts supposedly controlled by the defendant.

The sole proof offered by the Government to connect the defendant with any of the above transactions, other than the fact that she, along with other employees, had access to the check, consisted of expert testimony based upon comparison of handwriting samples allegedly given by the defendant voluntarily and various samples of handwriting contained in the above described transactions whereby the dummy bank accounts were set up and checks made and endorsed to draw out the proceeds of the altered check.

ALTHOUGH OFFICIALS AND EMPLOYEES OF THE BANKS IN WHICH THE VARIOUS ACCOUNTS WERE OPENED AND THROUGH WHICH THE PROCEEDS FLOWED WERE CALLED UPON TO TESTIFY FOR THE GOVERNMENT, NOT A SINGLE PERSON EVEN TRIED TO IDENTIFY THE DEFENDANT IN ANY WAY OR CONNECT HER WITH ANY OF THE TRANSACTIONS INVOLVED. (R. 78, 92, 99)

Moreover, it is clear that *at least eight other employees besides defendant* had full access to the mail and to the particular check. (R. 67, 71, 72). Moreover, an unnamed porter regularly performed the physical task of "walking" the company deposits to the bank and he, too, would have had easy access to the check in question. (R. 72)

The sole proof of the Government's case consisted of the validity of the comparison of samples of the various bank documents, including the endorsement on the

check in question, with samples purportedly given voluntarily by the defendant. (R. 129 et sequo)

The handwriting samples used by the Government were allegedly obtained from the defendant on two separate occasions early in 1962. (R. 108, 111) An F.B.I. agent first persuaded her to give one set of handwriting samples but these apparently proved inconclusive when tested at the F.B.I. laboratory and a second set of samples were obtained. (R. 119)

She was required to furnish this second batch of samples of handwriting at a meeting in which she was surrounded by F.B.I. agents at a Government office and was told what to write. (R. 120, 121) Although she was not under arrest at the time, she was, from a practical standpoint, as helpless as though she had been under arrest, being alone and without benefit of counsel.

There is a sharp conflict in the evidence as to whether the defendant furnished her handwriting samples on yellow paper, as she alleges, or upon white paper, as testified by the agent. (R. 203, 204)

The defendant took the stand in her own defense and the government was unable to bring up a single shred of evidence detrimental to her character or past history. She was a World War II widow and had worked for many years in positions of great trust. Her former employers testified in her behalf as character witnesses (R. 173, 176) as did the Clerk of the Civil District Court for the Parish of Orleans. (R. 178)

In a one day trial, without the benefit of any expert testimony whatever, and in which the F.B.I. handwriting expert was permitted to parade a mass of charts, photographic enlargements of handwritings, heavily larded with supposedly expert speculative conclusions, unchallenged by an opposing expert, this sixty year old lady was convicted.

The trial judge, who was reluctant in giving more than six days to prepare for trial, was more generous when it came to time quo ad the sentence. Petitioner was given the maximum sentence of ten years. (R. 249, 250)

REASONS FOR GRANTING THE WRIT

In its brief per curiam opinion the Fifth Circuit Court of Appeals brushed aside, without discussion, both the denial of the continuance and the denial of the bill of particulars. The magic phrase "judicial discretion" was simply invoked and two cases cited which involved factual situations not even remotely applicable.

It is our position that "judicial discretion" must be given a real and vital interpretation. Judicial discretion is not to be equated with infallibility.

MOST IMPORTANT, WHEN THE "JUDICIAL DISCRETION" IS EXERCISED BY A COURT IN IGNORANCE OF THE TRUE FACTS PRESENTED, THEN THE CONCLUSIONS REACHED ARE OPEN TO FULL SCRUTINY AND EVALUATION BY AN APPELLATE COURT.

Such is the instant situation. It is abundantly clear that the trial Court, when he refused the continuance, did not know that the government would use testimony as to handwriting of the employee Strobel *which had been obtained only a few days before trial.* (R. 158)

Thus, conceding, arguendo, that the Court was right in holding that the lack of diligence by previous counsel in obtaining expert testimony could not be used as a basis of granting a continuance after the old case was dropped and new counsel employed, even so, THERE WAS NO JUSTIFICATION WHATEVER IN FORCING A TRIAL WITHIN *FOUR DAYS* AFTER THE GOVERNMENT HAD TAKEN ITS LAST HANDWRITING SAMPLE.

The government expert, Miller admitted that he had only gotten the samples of the handwriting of employee Strobel *on the Saturday before the trial.* (R. 158) Since the trial started on a Tuesday, this was only four days before trial. Ruling out of Mr. Strobel as the possible culprit was an important part of the government case, as he had full access to the check. The government expert, Mr. Miller admitted that he made a comparison of Strobel's handwriting in order to rule him out as the guilty party. (R. 158)

It will be noted that the F.B.I. Agent who collected the samples of handwriting for comparison by the F.B.I. expert, Mr. Miller, stated that the reason that a comparison of Strobel's handwriting had not been made earlier was because "I was told that he was on vacation when this Geismar or Gelsmar check was supposed to have arrived from National Gypsum Company." (R. 114) He belatedly obtained and submitted

the specimen of the Strobel handwriting to the F.B.I. laboratory on *Jan. 13, 1965* (R. 115) and the government expert, Mr. Miller, testified that he only received the Strobel samples for comparison on the Saturday before trial, i.e. four days before trial. (R. 158)

Apparently, at the last minute it had occurred to someone preparing the Government's case that the mere fact that Strobel might have been on vacation from the company did not rule out the fact that he might have executed the crucial writings while in town but away from the office. This would have been simple with the aid of a confederate to bring him the check. Thus, in order to make out a logical case of exclusion of all persons who had closest and easiest access to the check, it was necessary to rule out Mr. Strobel. But, in using this last minute batch of Strobel specimens as a basis of ruling Strobel out, the Government was permitted to produce expert testimony on material which it was physically impossible for the defense to have even known about, much less prepare a technical rebuttal.

Aside from the obvious hardship effected by the surprise use of the last minute Strobel comparison testimony, the basic fact remains that the defendant did not have time to present any expert testimony what ever, *even in an abstract sense,* to assist the jury in evaluating the actual weight which should be given the comparison of handwritings. It is a well known fact that honest differences of opinion may well arise between competent handwriting experts and a leading authority, Osborn, devotes a whole chapter of his famous work to a discussion of: "Errors in Identification of

Handwriting". (Osborn, "The Problem of Proof", Chapter 28, page 474)

But, since the defendant was forced to trial without time to prepare or present any expert testimony whatsoever, the Government expert, Mr. Miller, was allowed to parade his theories and conclusions unchallenged as though what he said was Holy Writ. Confronted with this unchallenged show of authority and impressed with the prestige and dignity of the F.B.I. in the person of Mr. Gist, the jury was presented with what appeared to be an uncontroverted proof of guilt.

The tactical disadvantage imposed upon counsel for the defense by being obliged to go to trial without benefit of expert testimony, was well stated by trial counsel, Mr. Dowling, in his application for rehearing below: (R. 262)

> "For these reasons we submit that counsel was not qualified to handle the case, at the time he was forced to do so. This was tantamount to the defendant having no lawyer at all."

This estimate of the situation will ring true with experienced trial lawyers who well know that the only way to fight experts is with counter-experts.

What has been said above as to the surprise effect of the belated comparison and last minute presentation of testimony as to the Strobel testimony, applies equally to the denial of the bill of particulars. By denying the defendant any information as to the structure of the Government case except that the check was put

into a New Orleans bank, forced the defense to fight blindly against an unpredictable array of handwriting samples involved in the various steps of the transactions. This denial of the bill of particulars was specifically preserved in the argument to the Court of Appeals and presented as a specification of error. (Appellant's original brief, page 8.)

CONCLUSION

Although the grant or denial of a continuance is rarely made the subject of appellate review, there occasionally arise extreme situations where the veil of "judicial discretion" has been lifted so as to reveal some very clear cut errors of judgment. In a recent case this Court granted certiorari in a matter involving an alleged abuse of discretion as to a continuance, only to recall the writ for violation of Rule 60, 28 U.S.C.A. See: *MERRITT — Chapman and Scott Corp. v. Kent*, 309 F. 2d 891, cert. dismissed 83 S. Ct. 1118, 372 U.S. 982, 10 L. Ed. 2d 197.

Throughout the years, though paying obeisance to the principle of not interfering with a proper exercise of judicial discretion, Federal Courts have nonetheless seen fit to inquire as to the factual basis upon which the judicial discretion was supposedly operating. See *ROYSTER V. LEDERLE*, 128 F. 2d 197 and *GILBERT V. LACHAPELLO*, 127 F. 2d 750.

In the instant case the trial Judge exercised his judicial discretion under a gross misconception of the true factual situation and denied a continuance which he could not conceivably have denied had he known that

some of the expert testimony would be predicated upon *handwriting comparisons made four days before trial,* as to which it was physically impossible for the defense to be prepared to rebut. We submit that this travesty of a trial was a gross injustice to an elderly lady whose excellent past record demands a full and proper hearing which she has thus far been denied.

Moreover, we submit that in these days of ever increasing Federal power, it is highly appropriate that this Court supervise more vigilantly than ever the discretion exercised by its judiciary. There is more at stake here than a ten year old penitentiary sentence for this unfortunate woman. The integrity of the Federal system of Justice is also before this Bar.

We respectfully pray that, for the above reasons, a writ of certiorari be granted, that the judgment of the Fifth Circuit Court of Appeals be reversed and that the case be remanded for a new trial.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I am of counsel for petitioner in the foregoing petition for a writ of certiorari, that I am a member of the Bar of the Supreme Court of the United States and that on this day I served copies of the foregoing petition for Writ of Certiorari upon the Solicitor General of the United States and upon the United States Attorney for the Eastern District of Louisiana, by mail, postage prepaid, addressed to their respective offices.

New Orleans, La., June _____, 1965.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21449

MRS. DAGMAR C. JOSEPH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 6, 1965.)

Before WISDOM and GEWIN, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM: The appellant-defendant was convicted of a violation of 18 U.S.C. § 2314 and prosecutes this appeal.

The court finds no merit in appellant's contentions that she was improperly denied a continuance and a bill of particulars. Both of these matters rest within the sound discretion of the trial judge and will be reviewed only when there is *clear abuse*. *Taylor v. U. S.*,

279 F. 2d 10 (5th Cir. 1960); *Robertson v. U. S.*, 263 F. 2d 872 (5th Cir. 1959). Clearly, no such abuse is shown by the present record. In regard to the refusal to grant a continuance it is noted that the original complaint was filed on June 4, 1962 and the case did not come to trial until January 21, 1964. The fact that the defendant had three different attorneys during the process of her conviction does not change the result since the record indicates that all facets of her case were adequately explored.

It is further shown by the record that the jury verdict was amply supported by the evidence. The judgment is therefore AFFIRMED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 6, 1965

Issued as Mandate:

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21449

MRS. DAGMAR C. JOSEPH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(May 21, 1965)

ON PETITION FOR REHEARING

Before WISDOM and GEWIN, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby

DENIED.